

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

**CHAD FERNANDEZ, individually and
on behalf of all others similarly
situated,**

Plaintiff,

v.

Case No: 8:18-cv-2251-MSS-SPF

**TAMPA BAY RAYS BASEBALL LTD, a
Florida limited partnership,**

Defendant.

ORDER

THIS CAUSE comes before the Court for consideration of Defendant's Motion to Dismiss, (Dkt. 12), and Plaintiff's response in opposition thereto. (Dkt. 13) Upon consideration of all relevant filings, case law, and being otherwise fully advised, the Court **GRANTS IN PART AND DENIES IN PART** Defendant's Motion to Dismiss.

The Court finds that Plaintiff has adequately alleged his individual claim for a violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"). Plaintiff has alleged that Defendant sent text messages to him via an automatic telephone dialing system ("ATDS") without his prior express consent. (Dkt. 1 at ¶¶1, 43) Defendant's Motion to Dismiss improperly asks the Court to look outside of the Complaint to determine whether Plaintiff provided prior express written consent to receipt of the text messages. However, at this stage in the proceedings, the Court must accept Plaintiff's allegations that he did not consent to such receipt as true. To the extent Defendant asserts that

Plaintiff provided adequate consent to receive the subject text messages, it should assert that challenge as a defense in its Answer and prove the defense in litigation.


Moreover, Defendant's challenges regarding Plaintiff's ability to bring this case as a class action are premature. To the extent that Defendant contends that Plaintiff has failed to satisfy the Rule 23 class certification requirements or failed to prove that the class definition is not overly broad, those challenges should be raised at the class certification stage.

The Court notes, however, that it appears from a full reading of the Complaint that Plaintiff intends to represent only individuals who did not provide prior express written consent to Defendant. (See e.g., Dkt. 1 at ¶47 ("Management of these claims is likely to present significantly fewer difficulties than are presented in many class claims because the text messages at issue are all automated and the Class Members, by definition, did not provide the prior written consent required under the statute to authorize such text messages to their cellular telephones.") However, the class definition in the Complaint does not include such limitation. Instead, it includes all individuals who received text messages from the subject 5-digit phone number irrespective of whether such individuals provided written consent to receipt of those text messages. (Dkt. 1 at ¶35) Thus, Plaintiff is **DIRECTED** to amend the Complaint to allege a proposed class definition that is consistent with the remainder of the Complaint. The class definition should limit the class members to those individuals who did not provide prior express written consent to receive text messages from Defendant.

Accordingly, it is hereby **ORDERED** as follows:

1. Defendant's Motion to Dismiss, (Dkt. 12), is **GRANTED IN PART AND DENIED IN PART**.
2. Plaintiff shall have **fourteen (14) days** from the date of this Order to file an Amended Complaint consistent with the Court's ruling.
3. Defendant shall have **fourteen (14) days** thereafter to file its Answer to the Amended Complaint.

DONE and **ORDERED** in Tampa, Florida, this 20th day of November, 2018.



MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record
Any Unrepresented Person